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IN THE

Supreme Court of the United States

FILED
JAN 23 1967
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1966

HARRY SCHACKMAN; NATHAN DELUCA; and JOSEPH GROSS,

Defendants and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Respondents.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HARRY SCHACKMAN; NATHAN DELUCA; and JOSEPH GROSS,

Defendants and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Respondents.

JURISDICTIONAL STATEMENT

(RULE 13(2) AND 15) RULES OF THE UNITED STATES SUPREME COURT

(a) This is a joint appeal taken from the order of the Appellate Department of the Superior Court[1], County of Los Angeles, affirming each defendant's conviction. The judgment of conviction was affirmed without opinion (Appendix A) and a Petition for Rehearing and/or Certification to the California District Court of Appeals was denied and the order thereon entered on September 28, 1966. The issuance of the remittitur and judgment were stayed for a period of 90 days or until each appellant files his appeal in this court, whichever occurs first. (Ap-

[1] For the purpose of 28 U.S.C., §1257(2) the Appellate Department of the Superior Court is the "highest Court of the State" *Edwards v. California*, 314 U.S. 160, 86 L.Ed 119, 62 S.C. 164.

pendix B — Schackman; Appendix C — DeLuca; Appendix D — Gross.) An extension of time in which to docket the record with this court was granted on January 3, 1967. (Exhibit E.)

(b) The jurisdiction of this Court is invoked on the grounds inter alia that California Penal Code §§311 and 311.2 have been sustained against a claim of unconstitutionality under the Federal Constitution. Other questions raised also invoke Federal Constitutional questions and invoke the jurisdiction of this Court. (See *infra*).

(i) Defendants were separately charged but jointly tried with violating §311.2 of the California Penal Code. (Exhibiting or distributing obscene matter)

(ii) Judgment of the Appellate Department of the Superior Court affirming the conviction was rendered on September 2, 1966, without opinion. (Appendix A.) A Petition for Rehearing and/or Certification to the District Court of Appeal was denied as to each defendant on September 28, 1966. (Appendices B, C, D, respectively) The Notice of Appeal was filed in the Appellate Department of the Superior Court on November 1, 1966.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Codes §1257(2).

(iv) For case authority conferring jurisdiction upon this Court, see:

1. Appellate Jurisdiction: *New York Ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.ed. 184, 187; *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 60 S.Ct. 431, 84 L.ed. 596, 127 ALR 821; *Lambert v. Calif.*, 355 U.S. 225, 78 S.Ct. 240, 2 L.ed.2d 228.

2. Generally as to subsidiary questions involving Constitutional issues: *Scott v. Donald*, 165 U.S. 58, 170 S.Ct. 265, 41 L.ed. 632.

3. Vagueness and standardlessness of statutes: *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.ed.2d 447; *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.ed.2d 1344; *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.ed. 840; *U. S. v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.ed. 1877.

4. The requirement of a prior adversary proceeding: *Cotting v. Goddard*, 183 U.S. 79, 22 S.Ct. 30, 46 L.ed. 92; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.ed. 714; *United Public Works v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.ed. 754; *Oklahoma Operating Company v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.ed. 596; *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1237, 12 L.ed.2d 809; *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.ed.2d 649; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.ed.2d 1469; *Marcus v. Property Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.ed.2d 1127; *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 1328, 9 L.ed.2d 405. *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.ed.2d 484; *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.ed.2d 222.

5. Prior restraint: *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.ed.2d 1460; *Marcus v. Property Search Warrants, supra; A Quantity of Books v. Kansas, supra; Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.ed.2d 584; *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.ed.2d 1498.

6. Knowledge of obscenity: *Redrup v. New York, Cert. granted* April 25, 1966; *Austin v. Kentucky, Cert. granted* April 25, 1966.

7. Proof of corpus delicti of offense: *U.S. v. Klaw,* 350 Fed.2d 165 (2nd Cir.); *U.S. v. One Carton of Positive Motion Picture Film,* 248 Fed.Supp. 373; *U.S. v. 392 Magazines entitled "Exclusive",* 253 Fed.Supp. 485.

8. "Due process" and "equal protections": All cases above cited and *Palco v. Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.ed. 288.

(v) California Penal Code §311 is found in Stats. 1961, c. 2147, p. 4427, §5, and reads as follows:

"As Used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene.

Section 311.2 of the California Penal Code is found in Stats. 1961, c. 2147, p. 4428, §5 and reads as follows:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

(c) The questions presented on appeal are as follows:

1. Whether California Penal Code §311 and §311.2, both on their face and as applied, are unconstitutional in violation of Amendments I, IV and XIV to the United States Constitution in that said statutes are vague and "standardless". More specifically, under the statutes defendants were permitted to be convicted of exhibiting and distributing allegedly obscene film in a situation where the only evidence presented by the prosecution were the films themselves. No other evidence of "contemporary standards" was introduced.

2. Whether said statutes are unconstitutional in that said statutes do not provide for notice to an exhibitor or distributor that, in the opinion of the law enforcement authorities, the material which is being exhibited and distributed is obscene. As a result, an exhibitor or dis-

tributor who is uncertain as to the obscenity or non-obscenity of a particular film is compelled to forego the doing of a legal act or conducting a legitimate business or, in the alternative, is forced to assume the risk of sanctions being imposed after a criminal trial.

3. Whether said statutes, in permitting a seizure or arrest of constitutionally protected materials without prior judicial hearing, are unconstitutional and condone a prior restraint.

4. Whether, in a prosecution for exhibiting or distributing obscene film, the prosecution must prove that the defendant in fact had knowledge that the allegedly obscene material was obscene.

5. Whether as a matter of law the evidence was insufficient to sustain the conviction of appellants in that:

(i) The prosecution failed to offer any evidence of "community standards" which is part of the corpus delicti of the crime.

(ii) The prosecution failed to prove that the exhibition or sale of the films was done with knowledge that the films were obscene.

6. Whether the motion picture films upon which the convictions were based are constitutionally protected by virtue of the United States Constitution, Amendments I and XIV.

STATEMENT OF THE CASE

The facts of this case can be quite simply stated. Appellant Schackman is the owner of an "arcade" located on Main Street in the City of Los Angeles. This arcade is operated and regulated by virtue of a permit issued by the Police Commission by the City of Los Angeles. A portion of the operation consists in the showing of "girlie" pictures through the device of coin operated "peep shows". Appellant Gross is the manager of the arcade. Next door to the arcade is a bookstore owned by DeLuca. Part of the operation of the bookstore, besides the selling of books, is the selling of 8mm reels of "girlie" film. The 8mm film is identical to the 16mm film shown in the arcade. Therefore, a customer may buy an 8mm reel of the 16mm film which he has viewed at the arcade. If the patron wants to see what he is buying, he may go to the arcade and look at the 16mm film.

After certain pretrial motions were heard and denied (discussed infra) the cases were consolidated and tried before a jury (the prosecution declining to waive jury trial).

The only evidence presented by the prosecution to the jury was the allegedly obscene films which defendants were charged with exhibiting and distributing.

The defense was based upon a lack of knowledge by any of the defendants that the films were obscene. The lack of knowledge was based not only upon prior court rulings on somewhat similar films, but also on the fact that at least one of the films had been permitted to be used for a period of five to six years and at no time during that period had there been any warning, official or unofficial,

that said films were obscene, indecent or in violation of any law. (Reporters Transcript on Appeal, p. 138, l. 22 — p. 139, l. 7.)

The testimony of the arresting and investigating police officer (Shaidell) given to the court on the pre-trial motions corroborated the fact that he had seen the films for some time and that he had given no warning to the defendants that, in his opinion, or in the opinion of his superiors, the films in question were obscene. Furthermore, the officer testified that he had not submitted the films to judicial scrutiny prior to making the arrests of defendants but had, rather, submitted them to the Los Angeles City Attorney's Office. Thus, based exclusively on the opinion of members of the City Attorney's Office, arrests were made and the instant prosecutions commenced. No warrants of arrest or for search were issued.

At the time of the arrest not only were the films which were deemed objectionable taken from the machines, but approximately 19 other machines were stripped of their film. These were ultimately ordered returned at the time of the pre-trial motions.

With respect to the pre-trial motions and the issues raised herein, the following occurred:

Motions were made to the trial court to review the objectionable films D-15, O-7 and O-f2, and to rule that they were constitutionally protected material and not hard-core pornography under the rulings of the California Supreme Court in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800. In addition, motions were made to dismiss the complaints on the grounds that the subject statutes (§311 & §311.2 California Penal Code) on their

face and the manner in which they were applied in the instant case violated First and Fourteenth Amendments to the United States Constitution. (Reporters Transcript on Appeal, pp. 2-3). In addition there was a motion to suppress on the grounds of unlawfully seized materials. (Reporters Transcript on Appeal, p. 5.) Only this latter motion was granted, in part, with respect to films other than the films D-15, O-7 and O-12 which had been purchased by the police officer some two weeks prior to the arrests. (Reporters Transcript on Appeal, pp. 62-63.)

These motions and objections heretofore stated were renewed prior to the pronouncement of judgment on a motion for new trial and in addition thereto it was contended that where the only evidence was that of the films themselves and no evidence was presented by the prosecution of community standards, that as a matter of law the evidence was insufficient to establish the corpus delicti of the crime involved and that the State was enforcing standardless and vague criminal statutes. (Reporters Transcript on Appeal, pp. 207-208.) All objections raised in the court below were raised on appeal in Appellants' Opening Brief filed in the Appellate Department of the Superior Court, including the objections that §311 and §311.2 of the California Penal Code were unconstitutional and void both on their face and as applied in violation of Amendments I and XIV to the United States Constitution. (Clerk's Transcript on Appeal, pp. 56 & 75.)

By affirming the judgment of conviction without opinion (Appendix A), the Appellate Department of the Superior Court, a court of last resort, upheld the validity

of these sections in the face of the constitutional objection.

All the voir dire testimony with respect to the pre-trial motions and the rulings on said motions are found on pages 1 through 64 of the Reporter's Transcript on Appeal. The rulings on the motions for new trial and the written motions for new trial are included as a part of the Clerk's Transcript on appeal forwarded to this Court, as are the orders of the Appellate Department of the Superior Court in affirming the judgments of conviction and denying certification to the District Court of Appeals of the Appellants.

The basis of Appellants' contention is that the enforcement of the obscenity statutes of the State of California, in so far as they are applied to Appellants who are engaged in a licensed and regulated business, violates Amendments I and XIV to the United States Constitution. Appellants' position is buttressed by the procedures used by the enforcement officials, which procedures are delineated at Pages 30-32 of the Reporter's Transcript on Appeal in the testimony of Officer Shaidell. (It should be always kept in mind that these films or films similar to the ones which the officer had purchased and shown to the City Attorney's Office, were testified to have been shown for a period of approximately 5 years prior to the arrests without, any notice or warning to the Appellants of their alleged or possible violations of the statute). Officer Shaidell's testimony is as follows:

"Q. All right, on some prior occasion, had you purchased some film from the Arcade?

A. That's correct.

Q. Would that be D-15, O-7 and O-12?

A. That is correct.

Q. And prior to going down to Mr. Schackman's arcade, you viewed these three films with the gentlemen you named to determine whether or not they may be actionable, is that correct?

A. That is correct.

Q. Now, prior to going down and making any arrests, did you present the film to a Judge?

A. No, I did not.

Q. Did you secure a search warrant?

A. No, I did not.

Q. Then the only opinion that you received was that of City Attorneys and not that of a Judge, is that correct?

A. That is correct.

Q. And before you went down to the arcade, you had the intention of arresting any person there who might state that he knew what was contained in the film —

A. In the connection.

Q. — who was employed there?

A. That is correct.

Q. How many days prior to making the arrest, did you view these films with the City Attorney?

A. Approximately two weeks.

Q. Besides taking the particular films, which we have named D-15, O-7 and O-12, were any other films taken from Mr. Schackman's office?

A. Yes, they were.

Q. Did you view them?

A. Some of them.

Q. Can you estimate how many other reels of film you took?

A. I believe there are 19 rolls of film in the eight millimeter category, and I forget the exact number in the sixteen.

Q. Can you estimate?

A. I think fifteen, but I can find out for sure.

Q. How did you view them?

A. Through a projector.

Q. At the office?

A. At the SID division of the police department.

Q. In other words, you took them and then you viewed them, is that correct?

A. I stripped them, stripped some off to ascertain about what type they were, and we took these with us along with the other film.

Q. And you still have these films?

A. That is correct.

Q. They were not returned?

A. They are still in our possession.

MR. MARKS: I have nothing further."

Again at Page 50 of the Reporter's Transcript Officer Shaidell was being interrogated and the following occurred:

"THE COURT: Is it your policy to give verbal warnings with reference to suspected violation of 311.2?

THE WITNESS: Your Honor, Administrative Vice Division did not act as a censor for this City, and consequently, we do not warn for violations in the field of obscenity.

THE COURT: If you believe there is a violation of 311.2, you make an arrest, is that correct?

THE WITNESS: That is correct, Your Honor.

THE COURT: I think you have the answer to your point, Mr. Marks."

The Court then (Reporter's Transcript on Appeal p. 62) proceeded to rule on the various motions made prior to the empaneling of the jury:

"THE COURT: I will rule on these motions now.

First, as to the motion to dismiss on the ground that the matter is not obscene, the court denies that motion and makes the preliminary finding that the matter is not constitutionally protectable. Of course, there will be a jury question to decide that issue ultimately, but I so find at this time as a preliminary matter that the material is not protected.

As to the motion to dismiss on the ground of a collateral estoppel, is somewhat a vague motion. I deny that." [This motion was predicated on the grounds that on September 30, 1961, police officers had made a mass arrest of arcades on Main Street and had confiscated approximately 600 rolls of film that Mr. Schackman had been showing at his arcade. Among these films was D-15, the

film in question here, and no prosecution had been brought on that particular film.]

"As to the two motions made to dismiss on the ground that Penal Code 311.2 is unconstitutional both in its alleged vagueness and uncertainty and in its application and enforcement, I deny those motions, also.

Finally, as to the motion to suppress the prints that were seized on the ground of illegal search and seizure, that motion is granted in part. All the films other than the prints of D-15, O-7 and O-12 which were purchased and the other prints of the same number that were seized, are suppressed. So the People will not be permitted to introduce in evidence any of the prints other than D-15, O-7 and O-12. I hope that's clear. I have granted it in part, and denied it in part."

CONCLUSION

In conclusion, it is respectfully submitted that if persons engaged in lawful business can be subjected to criminal prosecution for exhibiting films which have been shown for 6 years without any indication or notice from the law enforcement officials that such films are deemed obscene and if such persons must forego engaging in such business for fear of being prosecuted criminally for exhibiting material which has not been subjected to judicial scrutiny prior to arrests being made, the prior pronouncements of this court with respect to First Amendment freedoms are rendered hollow and without meaning.

BURTON MARKS

Attorney for Appellants

APPENDIX A

Appellate Department
SUPERIOR COURT,

LOS ANGELES COUNTY, CALIFORNIA

No. CR A 6925 — Gross
No. CR A 6926 — DeLuca
No. CR A 6927 — Schackman

People vs. .....

Judgment in the above entitled appeal is affirmed. Judgment filed.

Date Sept. 2, 1966
Duplicate Notice

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By J. MACGREGOR, Deputy

APPENDIX B

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* *vs.* HARRY SCHACKMAN, *Defendant and Appellant.*	Superior Court No. CR A 6927 Trial Court No. 246736 ORDER DENYING REHEARING AND DENYING CERTIFICATION; ORDER STAYING REMITTITUR AND JUDGMENT

The petition of appellant for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause to the District Court of Appeal, and petition for order staying remittitur pending appeal to the United States Supreme Court, in the above-entitled case, having been filed and having been duly considered,

The petition for rehearing, and alternative petition for certification are hereby denied.

IT IS FURTHER ORDERED, upon request of appellant, that issuance of remittitur and judgment of this court be and the same are hereby stayed for a period of 90 days or until appellant duly files his appeal in the Supreme Court of the United States, whichever occurs earlier.

Dated Sep. 28, 1966

BY THE COURT.
AISO, Presiding Judge
BREITENBACH, Judge
HUFSTEDLER, Judge

APPENDIX C

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* *vs.* NATHAN DELUCA, *Defendant and Appellant.*	Superior Court No. CR A 6926 Trial Court No. 246730 ORDER DENYING REHEARING AND DENYING CERTIFICATION; ORDER STAYING REMITTITUR AND JUDGMENT

The petition of appellant for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause to the District Court of Appeal, and petition for order staying remittitur pending appeal to the United States Supreme Court, in the above-entitled case, having been filed and having been duly considered,

The petition for rehearing, and alternative petition for certification are hereby denied.

IT IS FURTHER ORDERED, upon request of appellant, that issuance of remittitur and judgment of this court be and the same are hereby stayed for a period of 90 days or until appellant duly files his appeal in the Supreme Court of the United States, whichever occurs earlier.

Dated Sep. 28, 1966

BY THE COURT.
AISO, Presiding Judge
BREITENBACH, Judge
HUFSTEDLER, Judge

APPENDIX D

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* *vs.* JOSEPH GROSS, *Defendant and Appellant.*	Superior Court No. CR A 6925 Trial Court No. 246729 ORDER DENYING REHEARING AND DENYING CERTIFICATION; ORDER STAYING REMITTITUR AND JUDGMENT

The petition of appellant for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause to the District Court of Appeal, and petition for order staying remittitur pending appeal to the United States Supreme Court, in the above-entitled case, having been filed and having been duly considered,

The petition for rehearing, and alternative petition for certification are hereby denied.

IT IS FURTHER ORDERED, upon request of appellant, that issuance of remittitur and judgment of this court be and the same are hereby stayed for a period of 90 days or until appellant duly files his appeal in the Supreme Court of the United States, whichever occurs earlier.

Dated Sep. 28, 1966

BY THE COURT.
AISO, Presiding Judge
BREITENBACH, Judge
HUFSTEDLER, Judge

EXHIBIT E

TITLE OF COURT AND CAUSE

ORDER

Good cause appearing therefor, IT IS ORDERED that the time be and the same is hereby extended to and including Tuesday, January 31, 1967, within which to docket the above-entitled causes.

Dated Jan. 3, 1967

/s/ Aiso
Presiding Judge

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IN THE

Supreme Court of the United States

October Term, 1966
No. 995

HARRY SCHACKMAN, NATHAN DELUCA and JOSEPH GROSS,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgments of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered September 2, 1966, be affirmed, and/or that the appeal taken therefrom to this Court, be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgments appealed from rest upon an adequate non-federal basis.

Statement.

This is a direct appeal from judgments entered September 2, 1966, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellants were charged in verified complaints, filed in the Municipal Court of the Los Angeles Judicial District with having violated California Penal Code Section 311.2. It was alleged that on November 3, 1965, the appellants "did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought, into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter."

The consolidated cases were tried by a jury. The appellants were adjudged guilty. Appeals were taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matters were submitted and thereafter the judgments were affirmed (Jurisdictional Statement, Appendix "A"). Petitions for Rehearing or Certification to the Court of Appeal were denied (Jurisdictional Statement, Appendices "B", "C" and "D"). A notice of appeal to this Court was thereafter presented.

ARGUMENT.

I.

California Penal Code Sections 311 and 311.2 Are Constitutional as Enacted, and as Applied to This Case.

Section 311 of the California Penal Code:

"As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311.2 of the California Penal Code:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

On October 20, 1965, a Los Angeles Police officer purchased three films (D-15, 0-7 and 0-12) from the Shack Book Store located at 518 South Main Street in the City of Los Angeles [R. T. p. 81]. The films were then viewed by members of the Los Angeles City Attorney's office to determine whether they were actionable [R. T. p. 31]. On November 3, 1965, the officer viewed the three films in machines at the Nugget Arcade locted at 522 South Main Street in the City of Los Angeles. Appellants Schackman and Gross were arrested at the Arcade for violating California Penal Code Section 311.2 [R. T. p. 83]. On November 3, 1965, copies of D-15 and 0-7 were purchased by a police officer at the Shack Book Store [R. T. p. 95]. Appellant De Luca was arrested at the Arcade for violating California Penal Code Section 311.2 [R. T. p. 123]. Incident to the arrests, various films were taken as evidence. After the appellants made a Motion to Suppress, the trial court ordered that all films taken incident to the arrest be returned, other than D-15, 0-7 and 0-12 [R. T. p. 63].

Appellants claim that Penal Code Section 311 is vague and "standardless" and that the prosecution should have presented evidence of "contemporary stand-

ards." In *Roth v. United States* (1957), 354 U.S. 476, 489, 1 L. Ed. 2d 1498, 1509, this Court declared that to judge obscenity, "the proper test is whether to the average person applying contemporary community standards, the dominant theme of the material in question, when taken as a whole, appeals to prurient interest."

It is obvious that when the United State Supreme Court has defined the test to judge obscenity, the Court has also set the criteria which are neither vague nor "standardless." The *Roth* definition was repeated by this Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, 5 and in *Ginzburg v. United States* (1966), 383 U.S. 463, 16 L. Ed. 2d 31, 35.

Appellee contends that the contemporary standards test is neither vague nor standardless. Just as a jury in a negligence case is guided by the "prudent or reasonable man" test (*Satterlee v. Orange Glen School District* (1942), 29 Cal. 2d 581, 587, 177 P. 2d 279), so the jury in an obscenity case is guided by the application of contemporary standards. The definition as interpreted by the courts is neither vague nor "standardless."

The state is not debarred from regarding the trier of fact as the embodiment of community standards competent to judge a work challenged for obscenity against these standards.

> *People v. Williamson* (1962), 207 Cal. App. 2d 839, 847, 24 Cal. Rptr. 734; Cert. denied. 377 U.S. 994, 12 L. Ed. 2d 1047.

The three films were viewed by the jury [R. T. p. 131]. Testimony was neither presented nor required, as to the films' prurient appeal. In determining whether certain material is obscene, some stimuli may be so elemental that the ordinary judge or juror should be able to recognize the nature of the appeal to the average man (*United States v. 392 Copies of Magazine "Exclusive"* (1966), 253 F. Supp. 485, 493).

It should be noted that the appellants put in evidence two films which were viewed by the jury [R. T. p. 201]. These films, from a prior case involving appellant Schackman, were not used to enlighten the jury to contemporary standards, but were offered as a defense to the issue of scienter [R. T. p. 181]. The two films had been held not to be obscene by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles in the prior Schackman case (See: *Schackman v. California* (1964), 379 U.S. 3, 13 L. Ed. 2d 21).

The three films are described in detail in *Schackman v. Arnebergh* (1966), 258 F. Supp. 983, 991, where the court at page 987 held that:

> "The appeal of the films, taken as a whole, is to a shameful and morbid interest in nudity, sex, and the female organs of sex and excretion, going substantially beyond customary limits of candor in description and representation, and utterly without redeeming social importance."

The court, at page 995, concluded that as a matter of law the films are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard-core sense because they come within the reasonable purview and ambit of both the Federal judicial definition of

obscenity and hard-core pornography, *Roth v. United States* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498; *Mishkin v. New York* (1966), 383 U.S. 502, 16 L. Ed. 2d 56; *Ginzburg v. United States* (1966), 383 U.S. 463, 16 L. Ed. 2d 31 and the California statutory definition of obscenity and hard-core pornography (California Penal Code Section 311, *Zeitlin v. Arnebergh* (1963), 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152). Appellee contends that the "art films" do not contain even a "modicum of social value" (*A Book v. Attorney General* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, 6). (See: *Landau v. Fording* (1966), 245 A.C.A. 872, 882, 54 Cal. Rptr. 177; hearing denied, 65 A.C. No. 21, minutes, p. 6). The appeal to prurient interest is so basic that expert testimony of this appeal need not be presented (*United States v. 1,000 Copies of Magazines Entitled "Solis"* (1966), 254 F. Supp. 595, 597).

The appellants claim that a judicial determination as to the obscenity of the films should have been made prior to their arrests (Jurisdictional Statement, p. 6). The fact that there was no preliminary judicial determination of obscenity does not make the seizure unlawful. The appellants were entitled to move to suppress, to move to return, or to seek mandamus, and their right to due process under the First Amendment of the United States Constitution was provided by the opportunity for an early court hearing on the issue of obscenity (*People v. Campise* (1966), 242 A.C.A. Supp. 713, 717-720, 51 Cal. Rptr. 85). The appellants' motion to suppress was granted as to all films except the three before this Court.

The arrest of the appellants for violation of Penal Code Section 311.2 was not a restraint of free speech

or press. In *A Quantity of Books v. Kansas* (1964), 378 U.S. 205, 211, 12 L. Ed. 2d 809, 813, the Court held that when a defendant has the opportunity to circulate the publications, he may raise the claim of non-obscenity by defense to a prosecution. The appellants at trial claimed that the "art films" were not obscene.

Appellants' defense was "based upon a lack of knowledge by any of the defendants that the films were obscene." (Jurisdictional Statement, p. 7). "Knowingly" as used in California Penal Code Section 311(e) means that the appellants must have known the contents of the material and must have been in some manner aware of its obscene character. "Knowledge that the matter is obscene" as used in the statute does not mean "knowledge that a court would decide the matter to be obscene." (*People v. Campise* (1966), 242 A.C.A. Supp. 713, 723, 51 Cal. Rptr. 815). *Mishkin v. New York* (1966), 383 U.S. 502, 16 L. Ed. 2d 56, 63, held that the element of scienter is met where only those who are in some manner aware of the character of the material are punished. Appellee contends that the appellants were aware of the character and contents of the films.

A retail license from the Los Angeles City Clerk was issued in the name of Nathan De Luca and the Shack Book Store at 518 South Main Street [R. T. p. 120]. De Luca testified that he had viewed the film D-15 [R. T. p. 184]. De Luca was the owner of the Bookstore and "had been selling films for quite a while." [R. T. p. 125].

A business license tax registration certificate was issued in the name of Joseph E. Gross for the Nugget Arcade at 522 South Main Street [R. T. p. 120]. Gross was the manager of the Arcade [R. T. p. 136]. He supervised the "art films" that go into the machines. He purchased them and edited them [R. T. p. 166]. Gross testified that if the material was not a "stage film," then it was not obscene [R. T. p. 153]. Gross had seen the film D-15 being shown [R. T. p. 194]. Gross had never actually seen anything too "raw" in a film [R. T. p. 168].

A police commission permit was issued to Harry Schackman doing business as The Nugget Arcade [R. T. p. 120]. Schackman is the owner [R. T. p. 8] and would come into the arcade at least three to four times a week [R. T. p. 148] and would stay from noon to six o'clock [R. T. p. 149]. If a machine was left on, Schackman would look at it for a few seconds [R. T. p. 149]. He was observed in the arcade going in and out of the backroom [R. T. p. 122].

The central issue in a criminal obscenity trial pivots on the potentially punishable conduct of the defendant rather than on the allegedly obscene nature of the material (*In re Klor* (1966), 64 Cal. 2d 816, 821, 51 Cal. Rptr. 903, 415 P. 2d 791). The "No Minors Allowed" sign [R. T. p. 152], the "girlie" photos on the wall [R. T. p. 92] and the catalogue of "girlie nude" films that could be purchased [R. T. p. 96] were further evidence of the appellants knowingly exploiting, pander-

ing and titillating the public with these films. The evidence amply shows that the appellants knowingly engaged in the calculated purveyance of filth. (*Smith v. California* (1959), 361 U.S. 147, 4 L. Ed. 2d 205).

It is submitted that California Penal Code Sections 311 and 311.2 were constitutionally applied in this case. Obscenity is not given the free speech and free press protection of the First Amendment of the United States Constitution. (*Kirby v. Municipal Court* (1965), 237 Cal. App. 2d 335, 338, 46 Cal. Rptr. 844). The appellants were not denied due process and equal protection of the law when they were arrested, prosecuted and convicted for knowingly purveying hard-core pornography.

II.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

The record and the jurisdictional statement disclose that no opinions were delivered by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles when the judgments were affirmed.

In *Stembridge v. State of Georgia* (1952), 343 U.S. 541, 96 L. Ed. 1130, it was held that, where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment.

Conclusion.

The appeal does not disclose that there has been a violation of appellants' rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

Appellee urges, therefore, that the appellants present no substantial question for the decision of this Court; that the judgments sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 995

HARRY SCHACKMAN; NATHAN DELUCA; and JOSEPH GROSS,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles

OPPOSITION TO MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL

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IN THE

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OCTOBER TERM, 1966

No. 995

HARRY SCHACKMAN; NATHAN DELUCA; and JOSEPH GROSS,

Appellants,

vs.

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Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles

OPPOSITION TO MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL

PRELIMINARY STATEMENT

Appellants have heretofore filed a Jurisdictional Statement in this Court. The Appellee has filed a MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THE APPEAL. In the within doocument, the Appellants address themselves to several of the issues and contentions raised by the Appellee. Specifically, Appellants

desire to correct some misconceptions which could easily arise from Appellee's out of context citation of authorities or citation of only a portion of the relevant statements made by the various Courts involved.

ARGUMENT

On Page 5 of Appellee's Motion, there is cited *People vs. Williamson*, 207 Cal.App.2d 839, 847, 24 Cal.Rptr. 734; Cert. denied, 377 U.S. 994, 12 L.Ed.2d 1047 (1962) for the proposition that "the state is not debarred from regarding the trier of fact as the embodiment of community standards competent to judge a work challenged for obscenity against these standards."

It should be noted that the statement of the above proposition first occurred in the concurring and dissenting opinion of Justice Harlan in *Smith vs. California*, 361 U.S. 174, 80 Sup.Ct. 215, 4 L.Ed.2d 205. Justice Harlan was quick to point out, however, that "Such a view does not, of course, mean that the issue is to be tried according to the personal standards of the judge or jury." (4 L.Ed.2d 205, 221, footnote 3).

It is submitted that if the personal standards of the trier of fact is not to be used to try an obscenity case then, of necessity, some evidence other than the films in question must be presented to the trier of fact in order for them to have a rational basis on which to judge contemporary community standards.

United States vs. 392 Copies of Magazine "Exclusive", 253 Fed.Supp. 485, is cited in Appellee's Motion. While the case does state that some stimuli may be so elemental that the ordinary judge or juror should be able clearly

to recognize the nature of the appeal to the average man, it is also stated, at Page 493, that the nature of the material in question determines whether or not expert testimony is necessary to prove the probable reaction of the average man to the various stimuli. Appellants strongly disagree with Appellee that the films involved in the instant case provide stimuli that are "so elemental that the ordinary judge or juror should be able to recognize the nature of the appeal to the average man." Nor do Appellants agree, as stated on Page 7 of Appellee's Motion, that the "appeal to prurient interest [of the film involved in the instant case] is so basic that expert testimony of this appeal need not be presented."

Appellee also states that no testimony was necessary as to the films prurient appeal (citing the "Exclusive" case, *supra*). This only indicates that there is a conflict of authority in the Federal Courts, since *United States vs. Klaw*, 350 Fed.2d 165 (cited in Appellants' Jurisdictional Statement) holds that a showing of the films alone is not sufficient proof of the corpus delicti. The fact that a conflict exists presents a cogent argument for the court hearing the instant appeal and resolving the conflict.

Appellee states that the two films that were viewed by the jury at the behest of the Appellants were offered merely as a defense to the issue of scienter, but were not offered to enlighten the jury relative to community standards. (Appellee's motion to Affirm the Judgment and/or Dismiss the Appeal, p. 6). Appellants disagree with Appellee and affirmatively state that the films were presented to the jury for both of the referred to purposes.

Appellee also failed to mention that the case of *Schackman vs. Arnebergh*, 258 Fed.Supp. 983, from which a quotation is set forth in Appellee's Motion, is on appeal to this Court.

In the *Schackman* case, a declaratory relief suit was brought in the Federal Court under the Civil Rights Act asking for a declaration that the California Obscenity Statutes as applied and enforced were unconstitutional and violated the Federal Civil Rights Act. A further declaration was asked that the films and magazines presented in evidence be declared not obscene as a matter of law under the California "hard core" pornography statute and Amendments I and XIV to the United States Constitution. This was the first case that the Judge (newly appointed to the Federal bench) had ever handled in the pornography or obscenity field, either State or Federal. Not only did the Trial Court refuse to convene a three-Judge Court, which was required, but in addition the written Memorandum Decision of the Court went far beyond the issues raised and is, in this writer's opinion, an example of an unsophisticated, non-judicial, personal and moralistic attitude so commonly found among lay juries who, like the instant trier of fact, have had no prior personal (or judicial) experience with the material which was to be reviewed or the subject matter of constitutional protections under the First and Fourteenth Amendments.

Appellee, on Page 9 of its Motion, raises the issue that the evidence indicated that the Appellants knowingly exploited, pandered and titillated the public with the films in question. Besides the fact that such a statement is not

properly before the Court, in that only jurisdictional matters are at issue at the present time, Appellee's statement that Appellants were "knowingly engaged in the calculated purveyance of filth" (Appellee's Motion to Affirm the Judgment and/or Dismiss the Appeal, P. 10) is not supported by the evidence or law. Appellant Schackman is a proprietor of a lawful business licensed by the City of Los Angeles. It is clear that the decision in *Mishkin*[1] is directed not at a person engaged in a business such as Appellant Schackman, but rather at the large scale advertising and sale of obscene material.

Finally, *Stembridge vs. State of Georgia*, 343 U.S. 541, 96 L.Ed. 1130, is cited for the proposition that "where the highest court of the state delivers no opinion and it appears that the judgment might rest upon a non-federal ground, this court will not take jurisdiction to review the judgment." While Appellants cannot, of course, quarrel with the proposition cited in *Stembridge*, Appellants respectively submit that the rule of *Stembridge* should not be applied where it is almost a virtual certainty that the judgment of conviction and affirmation thereof were based on constitutional grounds. Interestingly enough, Appellee fails to state the non-federal ground on which the decision of the highest Court of the State of California may have been based, which may constitute a defect in its Motion.

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[1] *Mishkin vs. New York*, 383 U.S. 502, 16 L.Ed.2d 56.

CONCLUSION

It is respectfully submitted that the instant appeal should be heard by this Court if only to clarify the Court's position in *Mishkin vs. New York, supra,* so that every bookseller who sells "girlie" films is not labelled and liabled by prosecutors who have misread the case and who set themselves up as the judge of community standards.

Respectfully submitted,

BURTON MARKS

Attorney for Appellants

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SCHACKMAN ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 995. Decided June 12, 1967.

PER CURIAM.

The judgment of the Superior Court of California, County of Los Angeles, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm the judgment of the lower court. *Ginzburg* v. *United States*, 383 U. S. 463.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.